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STATE FOR EEB/IP (BOLGER, URBAN)  
STATE PASS USTR (CWILSON)  
STATE PASS COMMERCE (DCALVERT)  
STATE PASS USPTO (MSHAPIRO)  
STATE PASS U.S. COPYRIGHT OFFICE (MSKELTON)

E.O. 12958: N/A

TAGS: [ECON](#) [ETRD](#) [KIPR](#) [SP](#)

SUBJECT: EMBASSY COMMENTS ON GOS SPECIAL 301 OBSERVATIONS

REF: A. A. FEBRUARY 25

1B. 2008 GOS OBSERVATIONS B. MADRID 00211

11. Summary: The Embassy offers the following review of the Spanish government's observations (ref A) on the International Intellectual Property Alliance's (IIPA) Special 301 recommendation for Spain. Our review is keyed to the Spanish document. Our assessment (ref B) of Spain's copyright-related Intellectual Property Rights (IPR) performance has not changed. We continue to believe that it would best serve U.S. interests to consider a delay in possible Watch List placement for Spain until the new officials that we expect will take over the IPR portfolio have had six months to improve copyright protection. As an alternative, we ask Washington agencies to consider placing Spain in the Special Mention category that IIPA recommends for Germany. End Summary

Degree of Piracy  
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12. The GOS says that its data show music piracy in 2006-2007 to be 13.1%, as opposed to the 20% reported by IIPA. We do not know whether the GOS data is more or less reliable than the data cited by the IIPA. We do know, however, that the Spanish Society of Authors and Editors (SGAE - Spain's premier collection society - it is truly a Spanish organization representing mostly Spanish creators and Spanish interests) has said publicly that Spain is a world leader in downloads of pirated songs. The SGAE relies on data compiled by the European Association of Interactive Publicity (EIAA). We think the SGAE data, coupled with anecdotal evidence from the Motion Picture Association of America, suggests the Spain truly does have a high rate of internet music and movie piracy.

13. With respect to entertainment software piracy, the GOS cites a PriceWaterhouse Coopers study showing entertainment software sales increasing from USD 577 million in 2006 to USD 665 million in 2007 in Spain. We have discussed the matter with the head of the Federacion Antipirateria (FAP), a major industry anti-piracy organization with ties to the Motion Picture Association of America and the Electronic Arts Council. He says that, yes, sales of self-contained electronic games have increased in Spain because piracy is not physically possible with these games. However, the FAP claims that in 2007, sales of game software used in personal computers declined by 15%, and the FAP attributes a large share of the decline to downloads of pirated software.

14. The Spanish government says that the IIPA asserts, without backing up with data, that piracy has reached "endemic

levels" in Spain. The GOS notes that the Business Software Alliance (BSA) does not state that Spain has higher piracy levels than other countries. The BSA has not recommended Watch List placement for Spain. This is a significant mark in Spain's favor. Computer software companies appear to think that they are getting the cooperation they need from the government to reduce software piracy.

¶15. The Spanish government says that the IIPA numbers show that music piracy in Spain decreased by 2% in Spain between 2006 and 2007. That may or may not be true. The more telling numbers for the music sector are that in 2007, physical music sales were euros 257 million, down from euros 346 million in 2006, i.e. sales were down by almost 26%. It is of course possible that some of this drop is attributable to the industry's offering less desirable product. And the reality is that the music business is suffering in many markets. But piracy must explain a significant percentage of this decline.

The legitimate internet download market was euros 3.5 million in 2006 and euros 5 million in 2007, i.e. it barely made a dent in the decline of physical music products. The head of the local music association, Promusicae, notes that in 2007, the legitimate cellphone download market was euros 22 million, i.e. it was more than four times as large as the legitimate internet music download market. His conclusion is that if consumers face a desirable format for listening to music and piracy is not possible, they will pay for the product. If the internet is not adequately controlled, consumers will download for free. This seems to us to be a compelling argument that the GOS should do more to regulate the internet.

¶16. The Spanish government does not comment on movie piracy, which is one of the areas highlighted by the IIPA and one of our major concerns.

2006 Circular from the Office of the Prosecutor-General

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¶17. The GOS says that the Circular does not "depenalize" peer-to-peer file sharing. We believe the government's argument is probably legally correct. We believe that the problem is that the message the Circular sends to Spanish society is that peer-to-peer file sharing is acceptable as long as there is no commercial profit motive. Most Spaniards, including future judges and prosecutors, to the extent they have heard or read about the Circular, believe that this document legitimizes individual downloads of movies or music. The issue is further conflated with Spanish law's right to a private copy. Creators are compensated in Spain for private copies through copyright levies. In the public imagination, a movie or music download is often considered equivalent to making a private copy. As the private copy is compensated through copyright levies, many Spaniards do not see any moral, let alone legal, problem with individual downloads of pirated music or movies. Spanish government officials are fully aware that this is not a legally correct interpretation of the law. In fact, in connection with the November 6/7, 2007 Madrid IPR conference, a senior Spanish official stated publicly that the copyright levy system does not compensate creators for music or movie downloads because the private copy has to be made from a legally acquired product. By definition, downloads of pirated products are not legally acquired products. The Spanish government has not done enough to undo the harm unleashed, albeit probably not by design, by the Circular. We would like to see the Circular amended in a public way so as to educate Spanish society that peer-to-peer file sharing is not legal.

Legislative reform

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¶18. The Spanish government notes that the IIPA criticizes the absence of a notice and takedown provision in the Information Society Law (LSSI). The government says that it tried to get such a provision passed through Article 17bis, but that the Council of State censured it because interested stakeholders had not been given an opportunity to comment on the article.

However, Article 17 bis, or a variant thereof, has been discussed in a GOS-stakholder working group since 2005. The Spanish government is in effect saying that it committed a procedural mistake that explains the lack of results in this area.

¶9. Like last year, the Spanish government notes that the Commission has not initiated proceedings against Spain for inadequate transposition of the EU's Directives on enforcement and electronic commerce. This is an argument that has some merit to it. The GOS claims, in addition, that the Promusicae vs. Telefonica case confirms that "Spanish law is "fully compatible with Community law as concerns enforcement and the right to information." That case states that there needs to be a balance between the right to privacy and the need to protect copyright. We can credibly claim that Spain has not done enough in this regard.

¶10. The Spanish government claims that Spanish law does protect technological protection measures (TPMs), contrary to what IIPA says. It says that Article 139(1) g) of the consolidated text of the Intellectual Property Act and Article 270(3) of the Criminal Code provide for TPM protection. We cannot evaluate this assertion, but we think the IIPA should be made aware of these specific legal provisions cited by the Spanish government.

#### Mediation between stakeholders; Government leadership

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¶11. The Spanish government notes that it created a working group comprised of content owners and Internet Service Providers (ISPs) to encourage self-regulation. This is true, but this group has been meeting since early 2005 with no results. The GOS says that it is its "intention to strengthen its role with a view to facilitating negotiations and overcoming inflexible stands taken by the parties." We welcome this objective, but during the past three years, the music and movie industries have seen revenues decline, while ISPs have seen their revenues increase, and the government has not succeeded in getting the ISPs to be more cooperative with content providers.

¶12. The 1/30/08 Ministry of Culture-Spanish Federation of Hotels and Restaurants agreement to conduct training and awareness-raising with a view to eliminating illegal sales in bars and restaurants is a positive step. However, at this stage we cannot evaluate when it might actually reduce the "mochilero" problem in Spain.

#### Activities undertaken by the Government to fight piracy

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¶13. We tend to accept the Spanish government's views regarding the degree of coordination and cooperation in the fight against piracy, although there are clearly weaknesses with respect to the internet.

¶14. The Public opinion and social reality poll is a useful tool, but so far it has not prompted effective anti-piracy action.

¶15. The Ministry of Culture runs awareness programs, but so far they have not had a discernible impact on, for instance, the public's views with respect to internet downloads.

¶16. The training programs the Spanish government talks about are valuable, particularly the programs directed at the police and the judiciary.

#### Police intervention and legal judgments

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¶17. We accept the Spanish government's view that the good police work highlighted by the IIPA does receive high-level political support. We note also that some webpages trafficking in pirated copyrighted materials have been closed down. On March 3, 2008 a Barcelona judge ordered blocking

access to a website trafficking in counterfeited goods from China. There are frequent law enforcement actions against pirates. However, the GOS has never appointed a political-level person to be the public face of the "National Anti-piracy Plan" referred to in the Spanish government's comments. There is no political-level inter-ministerial coordinator for the plan. Without a single coordinator, accountability is dispersed, particularly with respect to shaping views on the all-important issue of protecting copyrighted materials on the internet.

COMMENT

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¶18. The Embassy does not underestimate the political challenge facing the policy-level officials in charge of IPR issues (some of whom are likely to be new even though the socialist government was reelected on March 9). Public opinions about the internet and copyright are, frankly, hopelessly muddled. Our sense though is that we may be able to use the momentum generated by France and the UK moving against internet piracy more effectively without Spain's being placed on the Watch List, at least not immediately. On balance, therefore, we think that for now our IPR agenda in Spain would be served more effectively without Spanish placement on the Watch List, at least not immediately. For instance we know that USEU and Washington agencies are working to put together a "road show" which would come to Spain in the spring or early summer. The road show would include French and British experts (ideally Denis Olivennes among others) on internet piracy. We think the Spaniards would be more receptive to hearing what France and the UK are doing without a Watch List designation. Alternatively, a Special Mention for Spain might be worth considering given that, according to IIPA, internet piracy is a very serious problem there. Judging from the IIPA submission, there are many similarities between the German and Spanish internet piracy situations. In any event, the first year of this newly reelected government's mandate will be crucial in making progress on internet piracy in Spain. 1

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